

The manufacturer's discretion will be exercised in an environment in which two conditions exist. First, the design of individual items of equipment to incorporate solutions to a wide variety of barriers is impractical. For example, individuals with some types of impaired mobility may benefit from a keypad that is larger than the one normally used with telephones, while others may benefit from a keypad that is smaller than the keypad normally used. The impracticality of designing a single product with both "solutions" to impaired mobility is obvious. And, second, consumers, including individuals with disabilities, have the ability to choose among manufacturers' offerings in a competitive marketplace. In the case of buildings and facilities there is little, if any, ability to choose to enter a building on the basis that meets one's unique accessibility needs; therefore all buildings and facilities must be equally accessible. In contrast, CPE generally is used by an individual or a small known group of individuals, is selected to meet the unique needs of those specific individuals or small groups of known individuals, including individuals with disabilities, and is obtained from among a variety of products available from a manufacturer. In many cases the needs of an individual with disabilities can be satisfied by selecting specific equipment from among that generally available in the marketplace. Examples include vibrating pagers (useful both for individuals with impaired hearing and those who wish a "silent alert"), volume controls (useful for both those with impaired hearing as well as those working in a noisy environment), and speakerphones (useful for both those with certain musculatory or skeletal impairments which prevent holding a telephone receiver to the ear as well as those who participate in lengthy conference calls).

If manufacturers of telecommunications equipment and CPE were not afforded this reasonable degree of manufacturers' discretion in choosing among a wide range of accessibility features, the cost of complying with the requirements of Section 255 would be excessive and counter-productive to achieving the goals of Section 255. For example, if manufacturers were required to demonstrate either that each product that they sell is accessible or that accessibility is not readily achievable, the result could be large, costly, compliance bureaucracies employed by the Commission and by manufacturers, and a diversion of resources from product design and development with the inevitable long-term result of reduced accessibility – both an unintended and undesired consequence.

3. General guidelines for manufacturers.

Adoption of a disciplined process to ensure accessibility and compatibility. Recognizing that accessibility is most effectively addressed at the beginning of the product introduction process, Section 255 requires manufacturers to ensure that equipment is “designed, developed, and fabricated to be accessible to and usable by individuals with disabilities. . . .” In addition, these Guidelines establish an expectation that, no later than twelve months following the effective date of these Guidelines, each manufacturer of telecommunications equipment or CPE will adopt a disciplined process for evaluating the means for accomplishing the goal of enhancing the accessibility and usability of its equipment.

Generally, design activities commence approximately 24 months prior to the first introduction of new CPE into the marketplace, and, in the case of telecommunications equipment, even earlier. It would be unrealistic to expect that manufacturers would be able to consider the Access Board and Commission Guidelines in their equipment designs prior to, or even immediately following, the effective date of these Guidelines. Thus, a twelve month period is established for the purpose of enabling manufacturers to: (i) develop a process for evaluating the accessibility of its product designs; (ii) identify barriers to accessibility; (iii) incorporate solutions to those barriers to the extent that they are readily achievable; (iv) communicate that process to its equipment designers and developers; and (v) train its designers and developers in the use of the process.

Each manufacturer may adopt that disciplined process which is most consistent with its unique organizational and management structure, provided that the process, at a minimum, will: (a) identify barriers to the accessibility of the manufacturer's telecommunications equipment or CPE resulting from the limitations constituting a disability; (b) disseminate information about accessibility needs and barriers to employees and others involved in the equipment design and development processes; (c) consider accessibility early in the design and development processes; and (d) evaluate designs to remove barriers to accessibility or to enhance the accessibility of telecommunications equipment or CPE.

Because of the wide variety of manufacturers' organization structures, the absence of generally agreed-upon approaches to identifying the accessibility barriers and solutions, and the very immature state of what could be called "accessibility engineering" principles, third-party auditing or certification of manufacturers' processes for identifying and resolving barriers to accessibility is not required.

The Access Board, at the time it promulgated its ADA Accessibility Guidelines for Buildings and Facilities ("ADAAG"), had the benefit of a decade or more of experience in discharging similar responsibilities required by the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355. Moreover, in the case of the construction of accessible buildings and facilities, the affected industries had a similar period in which to gain experience in constructing facilities to meet the requirements of the predecessors to the ADAAG. By contrast, no similar base of experience exists related to the accessible design, development, or fabrication of telecommunications equipment and CPE.² In view of the uncertainty that necessarily results from this lack of experience, requiring third-party audit or certification programs is unnecessary and of little or no value.

Manufacturers shall incorporate into their equipment those designs to increase accessibility identified by their processes to the extent that it is readily achievable to do so. Paragraphs 9. and 10. describe those aspects of accessibility and

² For example, the Access Board's Notice announcing the establishment of its Advisory Committee states that the Committee will be charged with identifying the barriers to the use of telecommunications and customer premises equipment by persons with various types of disabilities and the solutions to such barriers, if known, categorized by type of disability. . . . (Emphasis added.)

compatibility which manufacturers are expected to consider when evaluating whether it is readily achievable to make telecommunications equipment and CPE accessible or compatible. They contain the substantive portions of Subparts C and D of the Architectural and Transportation Barriers Compliance Board's ("Access Board") proposed Telecommunications Act Accessibility Guidelines. Notice, 62 Fed. Reg. 19178.

When designs to remove barriers to accessibility are not readily achievable, manufacturers shall: (a) identify applicable interface standards, adopted by accredited standards bodies governing the connection of telecommunications equipment or CPE with existing peripheral devices or specialized customer premises equipment, and (b) ensure compatibility with such standards, to the extent that it is readily achievable to do so.

Adoption of measures to ensure usability. Not later than twelve months following the effective date of these Guidelines, manufacturers are required to adopt measures to ensure that individuals with disabilities are provided with usable information and documentation about their telecommunications equipment or CPE, to the extent that it is readily achievable to do so.

Because marketing and product communications are not a part of the equipment design, development, and fabrication process, they are not covered by Section 255. Nevertheless, because marketing and product communications, including user

guides or instructions, installation instructions for end-user installable devices, and other product support communications like customer call centers, are an important aspect of making equipment accessible to and usable by individuals with disabilities, manufacturers have voluntarily agreed to provide such information, including information about accessibility and compatibility features, in alternate formats.

4. Complaints

General. Section 255(f) gives the Commission "exclusive jurisdiction" over Section 255 complaints. Section 255 does not permit private lawsuits to enforce Section 255 requirements.

Informal Resolution of Inquiries or Complaints. The Commission should establish a policy in favor of voluntary resolution of Section 255 complaints. In many instances, manufacturers and persons with disabilities will be able to resolve voluntarily complaints about the accessibility or compatibility of telecommunications equipment and CPE. A policy that favors voluntary resolution of complaints will conserve the limited Commission resources available for enforcement. Moreover, a cooperative approach between manufacturers and persons with disabilities is most likely to promote the goals of accessibility and compatibility established by Section 255.

Each manufacturer subject to Section 255 should be required to establish one or more points of contact to answer inquiries, to provide information, and to address

complaints about the accessibility of its telecommunications equipment or customer premises equipment. Each manufacturer should provide its points of contact information to the Commission and, upon request, to individuals with disabilities or to their representatives. This will ensure that there is at least one person from each manufacturer who is responsible for receiving and coordinating inquiries and complaints from persons with disabilities or the Commission.

To implement this policy in favor of voluntary resolution of Section 255 complaints, the Commission should require that all complaints be submitted to the manufacturer's point of contact in the first instance, before they are submitted to the Commission. In order to ensure that complainants receive a prompt response from manufacturers, a manufacturer must respond to a written complaint (which may be in electronic form including electronic mail, facsimile transmission, or audio cassette) within 60 days after receipt thereof, unless the complainant agrees to an extension.

The Commission should only consider those complaints that cannot be resolved informally between a complainant and a manufacturer. At a minimum, this mandatory attempt at informal resolution will require a complainant to submit a complaint to the manufacturer and allow the manufacturer 60 days in which to resolve the complaint or formulate a response. If a person with a disability submits a complaint to the Commission without exhausting these requirements for informal complaint resolution, the Commission should either return the complaint to the complainant with instructions about how to contact the manufacturer, including the manufacturer's point(s)

of contact information, and how to utilize the informal complaint process or forward the complaint to the manufacturer's point of contact for informal resolution.

Formal Commission Resolution of Complaints.

Pleading requirements. A complaint must demonstrate on its face that the complainant is entitled to formal consideration on the merits. First, and most important, a complainant must demonstrate that he or she has attempted to achieve an informal resolution of the complaint as described in the above discussion of the informal resolution of inquiries or complaints. As a result, the complaint must either: (1) include copies of the informal complaint submitted to the manufacturer and the manufacturer's response; or (2) demonstrate that the manufacturer failed to respond or provide a satisfactory resolution of a complaint within 60 days.

Second, in order to state a claim that Section 255 has been violated, a complaint should state with particularity the barrier to accessibility or compatibility associated with the equipment subject to the complaint. Particularity is necessary to allow both manufacturers and the Commission to respond effectively to complaints. Accordingly, a complainant should be required, at a minimum, to identify the specific feature of the equipment that is not accessible or compatible. For example, a complaint indicating that "this phone is inaccessible to me as a person with a hearing impairment" does not demonstrate sufficient particularity. In contrast, a complaint indicating that "the volume control on this phone cannot be adjusted loud enough so that I can hear" is sufficiently particular.

Additionally, a complainant should, whenever possible: (a) identify a specific known solution to the barrier complained of; and (b) demonstrate that incorporating that feature would have been readily achievable. Complainants bear the burden of proving that Section 255 has been violated. As a result, those complaints that identify specific, known, readily achievable solutions to accessibility or compatibility barriers will be the most compelling. By including such information, if known, a complainant can focus the Commission's scrutiny upon the specific alleged area of non-compliance.

Where the Commission determines that a complaint appears on its face to qualify for formal resolution, the Commission shall notify the manufacturer's point of contact and the complainant of this determination. The manufacturer then has 60 days in which to provide a written answer to the Commission.

5. Complaint answers.

Manufacturer's answer. A manufacturer shall have 60 days from receipt of the notice from the Commission indicating that a complaint appears to qualify for formal resolution in which to file an answer. In the answer, a manufacturer may raise several defenses.

A manufacturer may argue that the complainant has failed to exhaust the mandatory voluntary complaint resolution process with the manufacturer. If a manufacturer's response to a complaint demonstrates that either: (1) the complainant has not submitted the complaint to the manufacturer; or (2) the manufacturer's 60 days to respond to an informal complaint have not yet expired, then the Commission should return the complaint.

A manufacturer may argue that it is entitled to a presumption of compliance because it has adopted a disciplined process for evaluating and incorporating accessibility and compatibility issues as part of the product design process. Accessibility and compatibility can be addressed most easily and economically if considered early in the design process, with the result that accessibility or compatibility features are more likely to be readily achievable. By establishing this presumption, manufacturers have an incentive to adopt such a disciplined process. A manufacturer may invoke this presumption if it has: (1) adopted such a process; (2) described that process either to the Commission or to the complainant; and (3) used that process consistently.

A manufacturer may assert any of three defenses on the merits. These defenses identify those circumstances where a manufacturer has complied with its obligation under Section 255 by providing equipment that is accessible or compatible, to the extent readily achievable. First, a manufacturer should be permitted to demonstrate that the product complained of is, in fact, accessible or compatible for the complainant.

Situations may arise, for example, where a product is in fact accessible or compatible if used correctly, but has not been used correctly by the complainant.

Second, a manufacturer may demonstrate that one or more of its existing products, or products in the design and development stage, with reasonably comparable features and price provide, or will provide, the accessibility or compatibility required by the complainant. By permitting this defense, the Commission recognizes that the readily achievable standard does not require every piece of telecommunications equipment to be accessible to every person with a disability. Instead, Section 255 requires each manufacturer to provide a range of functionally equivalent, comparably priced products that are accessible to individuals with disabilities. The ADA, the source of the "readily achievable" standard that defines the scope of manufacturers' obligations, provides guidance here. The ADA has been implemented with a recognition that the readily achievable definition will, in some circumstances, result in persons with disabilities having accessibility but fewer choices than the general public. *See e.g.*, Department of Justice Standards for Accessible Design, 28 C.F.R. § 36.308 (regulations governing fixed seating in public theaters and stadiums); 28 C.F.R. Part 36, App. A, § 9.1.2 (wheelchair accessibility of hotel rooms); *Id.* at § 9.1.3 (requirements related to hotel rooms and accessibility for individuals with hearing impairments). The common thread in these regulations implementing the ADA is that persons with disabilities will have a more limited number, but comparable range, of choices in comparison to individuals without disabilities.

A product family approach to compliance with Section 255 is warranted because of the varying and occasionally conflicting accessibility needs of persons with different disabilities. This approach to compliance will permit manufacturers to incorporate a range of accessibility and compatibility features to accommodate different disabilities, to the extent readily achievable, across the manufacturer's product families. This approach will maximize the types of equipment that are accessible and compatible for persons with different disabilities.

Third, a manufacturer may demonstrate that the requested accessibility or compatibility feature was not readily achievable and therefore not required by Section 255. Readily achievable is defined to mean "without much difficulty or expense." In addition, the amount of difficulty required cannot easily be quantified. As a result, what is readily achievable and therefore required must necessarily be resolved on a case-by-case basis utilizing the criteria set forth in the discussion of the meaning of the term "readily achievable."

Where the Commission has entered a consent order and the time for the manufacturer to comply with that order has not yet expired, the manufacturer shall be shielded from complaints raising the same or substantially the same areas of noncompliance. The goals of accessibility and compatibility established by Section 255 will best be served by a policy which favors proactive over retroactive relief. For this reason, the Commission should attempt to negotiate consent orders with manufacturers that have either: (1) been found to have violated Section 255; or (2) voluntarily agree to

enter into such consent orders. Such consent orders shall require the manufacturer to undertake specific measures to remedy the identified or alleged area of noncompliance within a specified time period.

The Commission shall dismiss any complaints that raise the same or substantially the same identified or alleged areas on noncompliance as an existing consent order. In dismissing a complaint under this section, the Commission shall notify the complainant of the subject matter of the consent order and the deadline for compliance. The Commission also shall notify the complainant that subsequent complaints, except complaints alleging failure to comply with the consent order, are precluded and will be dismissed.

6. Replies to complaint answers.

Complainant's reply. A complainant shall be provided 60 days in which to reply to the manufacturer's answer. In order to rebut a presumption of compliance, a complainant should be required to present specific factual information demonstrating that the manufacturer in fact: (1) has not adopted a disciplined process; (2) has not described that process either to the Commission or to the complainant; or (3) has not used that process consistently.

Because a manufacturer's defenses on the merits are fact-based, a complainant, to overcome these defenses, shall be required to provide specific evidence

that the manufacturer's claimed defense is not factually accurate in one of the following respects: (1) the substitute product identified by the manufacturer does not possess reasonably comparable features and price as the product complained of; (2) the substitute product is not accessible to the complainant; or (3) the required accessibility or compatibility was readily achievable at the outset of the design and development activities related to the equipment subject to the complaint.

If a complainant fails either to respond or to provide specific evidence refuting the manufacturer's claimed defenses, the complaint shall be dismissed.

7. Remedies.

The Section 255 goals of accessibility and compatibility are best achieved with a policy that favors proactive relief over monetary penalties for violations of Section 255. In imposing a penalty for a violation, the Commission should prefer requiring that the manufacturer undertake additional obligations to achieve accessibility or compatibility in the future, rather than requiring payment of a fine.

Therefore, the Commission should, when appropriate, negotiate consent orders with manufacturers that have been found to have violated Section 255. Such consent orders would obligate a manufacturer to undertake specific measures to remedy an identified area of noncompliance within a specified time period. In addition, in exchange for dismissal of a complaint, manufacturers may voluntarily agree to a consent

order and undertake similar obligations for future remedial measures. These consent orders would be consensual in that they permit a manufacturer voluntarily to undertake a program that has been approved by the Commission as an appropriate method for remedying an alleged area of noncompliance with Section 255. In both instances, by agreeing to enter into a consent order and adhering to its terms, a manufacturer would avoid monetary penalties for noncompliance.

Consent orders should establish a specific time period or deadline for the manufacturer to fulfill its agreed upon obligations. Moreover, the manufacturer's obligations under the consent order must be sufficiently specific so that the manufacturer's compliance with the order, and therefore Section 255, can be accurately assessed at the end of the specified period.

Where a manufacturer fails to comply with a consent order, the manufacturer should be subject to any and all penalties that could have been imposed in the underlying complaint proceeding if all issues had been resolved against the manufacturer. The Commission would bear the burden of proving that the consent order has been violated in some material respect. A manufacturer's failure to comply with a consent order is only material if it has caused significant delay or resulted in a failure to accomplish the accessibility or compatibility contemplated in the consent order. Further, proceedings to determine whether a consent order has been violated shall be limited exclusively to this issue, and shall not address any additional issues related to compliance with Section 255.

8. Standards.

Section 255 of the Communications Act requires that, when it is not readily achievable for telecommunications equipment or CPE to be accessible, it must be compatible with existing peripheral devices or specialized CPE commonly used by individuals with disabilities to achieve access, if readily achievable.

Telecommunications equipment and CPE will be deemed to be compatible with existing peripheral devices or specialized customer premises equipment if it conforms with an applicable compatibility interface developed by a voluntary consensus-based standards development process. The purpose of this provision is to ensure that all manufacturers, including manufacturers of telecommunications equipment and CPE and manufacturers of peripheral devices and specialized CPE, have a reasonable degree of certainty regarding the technical means of achieving the interconnection of their equipment and an opportunity to participate in the development of standard means of interconnection. Without the certainty afforded by defined interface standards, manufacturers of telecommunications equipment and CPE will be unable, as a practical matter, to achieve a significant and predictable degree of compatibility with peripheral devices and specialized CPE.

Consistent with the National Technology Transfer and Advancement Act of 1995, 15 U.S.C. 3701, any technical specifications and practices, comprising

compatibility interface standards for the interconnection of telecommunications equipment or CPE with peripheral devices or specialized CPE used to achieve access, should be developed by private, voluntary standards-setting bodies. The telecommunications industry (comprising manufacturers of telecommunications equipment and CPE and service providers) has a long history of developing standards to ensure the interoperability of the many distinct elements of a modern telecommunications system using voluntary, accredited, consensus standards organizations such as the Telecommunications Industry Association (TIA) and American National Standards Institute (ANSI) Committee T1. The ANSI program for accrediting voluntary standards development organizations is well-developed and widely recognized. ANSI provides an opportunity for public review and comment on all applications for ANSI accreditation and limits its accreditation to those standards-setting organizations that are open to participation by all affected parties, foster the development of a consensus position among those affected parties, and operate in accordance with generally accepted principles of openness and “due process.”

In addition, the ANSI accreditation program includes two mechanisms to ensure that, once accredited by ANSI, voluntary standards development organizations continue to operate in a manner consistent with their ANSI accreditation: ANSI has an appeals mechanism that can be used by any materially affected party with a complaint about an accredited organization’s standards development process and has implemented a program for auditing accredited organizations on a regular basis to ensure that their

activities conform with both their own accredited procedures and with the current ANSI requirements.